Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO W-05-73 OF 1998
GOPAL SRI RAM, ABU MANSOR AND AHMAD FAIRUZ JJCA
19 DECEMBER 1998

Criminal Procedure *— Habeas corpus — Invalid ground for — Appellant charged under Penal Code (FMS Cap 45) — Sentenced to six months' imprisonment by sessions court — Application for habeas corpus — Whether habeas corpus available*

Criminal Procedure *— Jurisdiction of court — Sessions court — Appellant a Muslim charged under Penal Code (FMS Cap 45) — Tried and sentenced by sessions court — Whether sessions court had jurisdiction — Whether appellant came under jurisdiction of syariah court*

The appellant was charged with an offence of gross indecency under s 377D of the Penal Code (FMS Cap 45) and was produced before the sessions court. He pleaded guilty, and was convicted and sentenced to a term of imprisonment of six months. He subsequently moved the High Court for a direction of a habeas corpus under s 365 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). The substance of the appellant's case was that the sessions court had no jurisdiction over him and therefore, his detention in prison was pursuant to an order that was null and void and of no effect. The appellant argued that the syariah court had jurisdiction over this case. The High Court dismissed the habeas corpus application and the appellant appealed against that decision.

There were two issues in this appeal: (i) whether habeas corpus would lie in a case such as the present where an applicant is seeking release from custody under execution of a sentence imposed by a court; and (ii) if the remedy was available, whether the appellant should be given it. The respondents argued that, having regard to the fact that the appellant's detention was pursuant to the execution of a sentence passed by a court of law, the only remedy available to the appellant was by way of an appeal against the decision of the sessions court. The High Court judge overruled this objection and held that habeas corpus was available, but refused the appellant relief.

Held, dismissing the appeal:

(1) The expressions 'unlawfully detained' and 'detention' in art 5(2) of the Federal Constitution do not apply to the case of a person held in a prison in execution of a sentence passed by a court of competent jurisdiction. The only remedy is that of appeal under s 307 or s 358 of the CPC or an application for the court to exercise its powers of revision under s 323 of the CPC or s 35 of the Courts of Judicature Act 1964. The only instance where habeas corpus may exceptionally lie would be a case where the court passing sentence had no jurisdiction to do so. Absence of

jurisdiction must be patent upon the face of the record and not by having recourse to matters outside the record. The judge was wrong in the construction he placed upon art 5(2) of the Federal Constitution (see p 277B–F).

The charge against the appellant under s 377D of the Penal Code (FMS Cap 45) is one which the sessions court had jurisdiction to try. It also had the jurisdiction to pass the sentence of six months imprisonment upon the appellant. Therefore, the appellant's case did not come within the exception and habeas corpus was not available to him as a matter of law (see p 277G–H).

(2) The expression 'jurisdiction of the syariah courts' in art 121(1A) of the Federal Constitution refers to their exclusive jurisdiction. If a person professing the religion of Islam does a proscribed act which is an offence both under the Penal Code (FMS Cap 45) and the Syariah Criminal Offences (Federal Territories) Act 1997 ('the Act'), then the courts referred to in art 121(1) will have jurisdiction to try such an offence. It is only in respect of offences under the Act that a syariah court has exclusive jurisdiction. In the present case, the sessions court was not dealing with an offence of 'liwat' under the Act but with an offence of gross indecency under s 377D of the Penal Code (FMS Cap 45). Further, art 145(3) of the Federal Constitution does not confer jurisdiction upon a court which has none. The fact that the Attorney General has instituted criminal proceedings before a particular court would not confer jurisdiction upon that tribunal if it lacked jurisdiction for some reason (see pp 280B–C, H–I and 281C–D).

[**Bahasa Malaysia summary**

Perayu telah dituduh dengan kesalahan kelucahan melampau di bawah s 377D Kanun Keseksaan (NMB Bab 45) dan telah dikemukakan di hadapan mahkamah sesyen. Beliau mengaku bersalah, dan telah disabitkan dan dijatuhkan hukuman pemenjaraan selama enam bulan. Beliau kemudiannya telah mengusul Mahkamah Tinggi untuk arahan habeas corpus di bawah s 365 Kanun Acara Jenayah (NMB Bab 6) ('KAJ'). Substans kes perayu adalah bahawa mahkamah sesyen tidak mempunyai bidang kuasa ke atas beliau dan dengan itu, penahanan beliau dalam penjara adalah menurut satu perintah yang batal dan tak sah dan tidak berkesan. Perayu berhujah bahawa mahkamah syariah mempunyai bidang kuasa ke atas kes ini. Mahkamah Tinggi telah menolak permohonan habeas corpus tersebut dan perayu merayu terhadap keputusan itu.

Terdapat dua isu dalam rayuan ini: (i) sama ada habeas corpus akan menidakkan seperti kes semasa di mana seseorang pemohon berusaha untuk mendapatkan pelepasan daripada jagaan di bawah pelaksanaan suatu hukuman yang dikenakan oleh mahkamah; dan (ii) jika terdapatnya remedi, sama ada perayu seharusnya diberikan

remedi itu. Penentang-penentang berhujah bahawa, dalam menimbangkan fakta bahawa penahanan perayu adalah menurut pelaksanaan hukuman yang dijatuhkan oleh sesebuah mahkamah undang-undang, satu-satunya remedi yang ada bagi perayu adalah melalui rayuan terhadap keputusan mahkamah sesyen. Hakim Mahkamah Tinggi telah menolak bantahan ini dan memutuskan bahawa terdapatnya habeas corpus, tetapi menolak relief kepada perayu.

Diputuskan, menolak rayuan:

(1) Ungkapan-ungkapan 'ditahan dengan menyalahi undang-undang' dan 'tahanan' dalam perkara 5(2) Perlembagaan Persekutuan tidak terpakai kepada kes di mana seseorang ditahan dalam penjara dalam melaksanakan sesuatu hukuman yang dijatuhkan oleh sesebuah mahkamah bidang kuasa kompeten. Satu-satunya remedi yang terdapat adalah rayuan di bawah s 307 atau s 358 KAJ atau satu permohonan untuk mahkamah melaksanakan kuasa-kuasa semakannya di bawah s 323 KAJ atau s 35 Akta Mahkamah Kehakiman 1964. Satu-satunya keadaan di mana habeas corpus boleh dengan cara yang terkecuali menidakkan adalah kes di mana mahkamah yang menjatuhkan hukuman tidak mempunyai bidang kuasa untuk melakukan sedemikian. Ketiadaan bidang kuasa seharusnya jelas menurut catatan dan tidak dengan jalan merujuk kepada perkara-perkara yang di luar catatan. Hakim adalah salah dalam tafsiran yang dibuat ke atas perkara 5(2) Perlembagaan Persekutuan (lihat ms 277B–F).

Pertuduhan ke atas perayu di bawah s 377D Kanun Keseksaan (NMB Bab 45) adalah suatu pertuduhan yang mana mahkamah sesyen mempunyai bidang kuasa untuk membicara. Ia juga mempunyai bidang kuasa untuk menjatuhkan hukuman pemenjaraan selama enam bulan ke atas perayu. Dengan itu kes perayu tidak terlingkung di dalam kekecualian dan habeas corpus tidak ada baginya sebagai suatu perkara undang-undang (lihat ms 277G–H).

(2) Ungkapan 'bidang kuasa mahkamah syariah' dalam perkara 121(1A) Perlembagaan Persekutuan merujuk kepada bidang kuasa eksklusif mereka. Jika seseorang yang menganut agama Islam melakukan sesuatu perbuatan yang diharamkan yang mana adalah satu kesalahan di bawah kedua-dua Kanun Keseksaan (NMB Bab 45) dan Akta Kesalahan-Kesalahan Jenayah Syariah (Wilayah-Wilayah Persekutuan) 1997 ('Akta tersebut'), maka mahkamah-mahkamah yang dirujuk dalam perkara 121(1) mempunyai bidang kuasa untuk membicarakan kesalahan-kesalahan yang sedemikian. Ia adalah hanya berkaitan dengan kesalahan-kesalahan di bawah Akta tersebut bahawa mahkamah syariah mempunyai bidang kuasa eksklusif. Dalam kes semasa, mahkamah sesyen tidak mempunyai urusan dengan kesalahan 'liwat' di bawah Akta tersebut tetapi dengan kesalahan

kelucahan melampau di bawah s 377D Kanun Keseksaan (NMB Bab 45). Selanjutnya, perkara 145(3) Perlembagaan Persekutuan tidak menganugerahkan bidang kuasa ke atas sesebuah mahkamah yang tidak mempunyainya. Hakikat bahawa Peguam Negara telah memulakan prosiding jenayah di hadapan sesebuah mahkamah yang khusus tidak akan mengurniakan bidang kuasa ke atas tribunal itu jika ia ketiadaan bidang kuasa kerana alasan yang tertentu (lihat ms 280B–C, H–I dan 281C–D).]

Notes

For cases on invalid ground for habeas corpus, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1389–1393.

For cases on jurisdiction of sessions court, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1593–1600.

Cases referred to

Anisminic Ltd v Foreign Compensation Commission & Anor [1969] 2 AC 147 (refd)

Attorney-General of The Gambia v Momodou Jobe [1984] AC 689 (refd)

B Ramachandra Rao v The State of Orissa AIR 1971 SC 2197 (refd)

Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act, Re AIR 1939 FC 1 (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345 (refd)

Dalip Kaur v Pegawai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1 (distd)

Janardhan Reddy v The State of Hyderabad AIR 1951 SC 217 (refd)

Keogh, Re (1889) 15 VLR 395 (refd)

Kesavananda Bharati v The State of Kerala AIR 1973 SC 1461 (refd)

Linnett v Coles [1987] 1 QB 555 (refd)

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187 (refd)

Long bin Samat & Ors v PP [1974] 2 MLJ 152 (refd)

Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793 (distd)

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42 (refd)

Phang Chin Hock v PP [1980] 1 MLJ 170 (refd)

PP v Datuk Harun bin Hj Idris & Ors [1976] 2 MLJ 116 (refd)

PP v Manokaran [1979] 1 MLJ 262 (refd)

PP v Viran [1947] MLJ 62 (refd)

R v Commanding Officer of Morn Hill Camp, Winchester, The, Ex parte Ferguson [1917] 1 KB 176 (refd)

R v Governor of Pentonville Prison & Anor, ex p Azam [1973] 2 WLR 949 (distd)

R v Secretary of State for the Home Department, ex p Mughal [1973] 1 WLR 1133 (refd)

Reference Re Procedures and the Mental Health Act (1984) 5 DLR (4th) 577 (refd)

Repco Holdings Bhd v PP [1997] 3 MLJ 681 (refd)

Victoria v Commonwealth (1971) 122 CLR 353 (refd)

Legislation referred to

Administration of Justice Act 1960 s 13(1) [UK]
Courts of Judicature Act 1964 s 35
Criminal Procedure Code (FMS Cap 6) ss 307, 323, 358, 365, 376
Dangerous Drugs Act 1952 s 39B
Federal Constitution arts 4(1), 5(2), 7(2), 121(1), (1A), 145(3), 159, Ninth Schedule
Penal Code (FMS Cap 45) s 377D
Subordinate Courts Act 1948
Syariah Criminal Offences (Federal Territories) Act 1997 ss 1(2)(b), 2

Appeal from: Criminal Application No 44–110 of 1998 (High Court, Kuala Lumpur)

Karpal Singh (*Jagdeep Singh Deo*, *Gobind Singh Deo* and *Pawancheek Marican* with him) (*Karpal Singh & Co*) for the appellant.

Ahmad Maarop (*Kamaludin Md Said* with him) (Senior Federal Counsel) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

The background

The appellant, Sukma Darmawan Sasmitaat Madja, was produced before the sessions court at Kuala Lumpur on 19 September 1998. He was charged with an offence of gross indecency under s 377D of the Penal Code (FMS Cap 45). He pleaded guilty and admitted the facts tendered by the prosecution in support of the charge. He was found guilty, convicted and sentenced to a term of imprisonment of six months.

On 27 October 1998, he moved the High Court at Kuala Lumpur for a direction in the nature of a habeas corpus ad subjiciendum under s 365 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). The substance of the appellant's case is that the sessions court had no jurisdiction over him. His plea of guilt is therefore quite useless. Since there was want of jurisdiction, his detention in prison is pursuant to an order that is null and void and of no effect. He is therefore entitled to immediate release.

The application was heard before Abdul Wahab J, who dismissed it on 7 November 1998. It is against that decision that the present appeal has been brought.

The issues

There are two issues that lie at the heart of the appeal. Both are of high constitutional importance. So far as we are presently advised, this is the first occasion upon which our courts are being called upon to make a pronouncement upon them. The first issue is whether habeas corpus would lie in a case as the present where an applicant is seeking release from custody under execution of a sentence imposed by a court. Second, if the remedy is available, then, whether the instant appellant should be given it. Although

A we have framed them separately, both issues are in truth, as may be seen later in this judgment, closely intertwined by reason of the challenge taken to the jurisdiction of the sessions court to deal with the offence of which the appellant was convicted. However, both issues concern the operation of certain provisions of the Federal Constitution and for that reason, we find it useful to remind ourselves of the principles that guide a court when B interpreting a written constitution such as ours.

Constitutional interpretation

There are several authorities that deal with the approach a court should C adopt when interpreting the provisions of a written constitution and the following principles, relevant to the present appeal, may be distilled from them:

1 Generally speaking, the rules of construction that guide a court in the interpretation of ordinary statutes apply with equal force when D interpreting the Federal Constitution. But there are important differences. For, the Federal Constitution, unlike any ordinary statute, does not merely declare the law. It creates and regulates the law-making power of the federation. It also creates and defines the various branches of government. It confers upon individuals certain fundamental and inalienable human rights, such as equality before the E law. Its language must accordingly receive a broad and liberal construction in order to advance the intention of its framers. Or as Lord Diplock put it in *Attorney-General of The Gambia v Momodou Jobe* [1984] AC 689 at p 700:

> A constitution, and in particular that part of it which protects and entrenches F fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.

2 A court, while rendering a broad and liberal construction to the language employed by the Federal Constitution, is not entitled 'to stretch or pervert the language of the enactment in the interests of any G legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors'. (Per Gwyer CJ in *Re Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act* AIR 1939 FC 1.) This general rule is, however, subject to an important qualification. Where the language of the constitution is open to two constructions, a court should adopt the construction H 'which will ensure the smooth and harmonious working of the constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory'. (Per Shelat and Grover JJ in *Kesavananda Bharati v The State of Kerala* AIR 1973 SC 1461 at p 1581.) Thus, a court, for the purpose of rendering a harmonious interpretation, is I entitled to make implications into the language of the constitution. An implication here refers to something that 'explains, perhaps limits, the effect of what is expressed'. (Per Windeyer J in *Victoria v Commonwealth* (1971) 122 CLR 353 at p 401.)

3 An expression appearing in the same or different provisions of a constitution may bear the same or different meaning according to the context in which it is used. For example, 'law' in art 4(1) does not have the same meaning as 'law' in art 159. See *Phang Chin Hock v PP* [1980] 1 MLJ 170.

4 An amendment to the Constitution when enacted in accordance with the provisions of art 159 becomes an integral part of the Constitution and falls to be construed together with the existing provisions. See *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

With that, we will now turn to address each of the two issues which we identified earlier in this judgment and deal with the arguments raised by counsel in respect of each of them.

The first issue: does habeas corpus lie?

When the appellant's motion came on for hearing in the court below, the respondents took the first issue as a preliminary objection. They argued that, having regard to the fact that the appellant's detention was pursuant to the execution of a sentence passed by a court of law, the only remedy available to the appellant was by way of an appeal against the decision of the sessions court. The learned judge in a careful and well-considered judgment overruled the objection and held that habeas corpus was available. He reproduced art 5(2) of the Federal Constitution which reads:

> Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

He then went on to say as follows:

> This application is a complaint that the applicant has been unlawfully detained. It is not a general allegation that his imprisonment is unlawful. He has given specific reasons for his complaint. If it is true as alleged that the sessions court has no power to try, convict and sentence in respect of a charge for sexual relations between two male Muslims because art 121(1A) of the Constitution read with s 25 of Act 559 seems to suggest, then his trial, conviction and sentence is in substance unlawful, and no plea of guilty could cure that defect. That defect is not merely acting beyond jurisdiction (often incorrectly termed 'out of jurisdiction'), where an appeal or revision would be the correct procedure, but one where the substratum of jurisdiction itself not exist. While an appeal is the proper procedure in a case of a of competent jurisdiction but is acting beyond jurisdiction, it is less obvious in a case where the question is whether the court is a court of competent jurisdiction.
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> Article 5(2) of the Constitution makes it mandatory for the court to hear the complaint, and unless satisfied that the detention is lawful, the court must order the person to be produced before it and to release him: *Yeap Hock Seng @ Ah Seng v Minister of Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279. It is not necessary for an applicant to show there is no other process available (*Kharak Singh v Uttar Pradesh* AIR 1963 SC 1295). This provision was included in the Constitution notwithstanding that there already existed

> provisions for directions in the nature of habeas corpus in the Criminal Procedure Code. Section 365 of the Criminal Procedure Code cannot be read as to restrict the meaning of art 5(2). The term detention as used in art 5(2) must be given a wide meaning to encompass arrest, remand, imprisonment or any other form of custodial limitation of the liberty guaranteed under art 5, howsoever it may be termed. Even if there is avenue for an appeal or revision, it cannot be said that in such a case the High Court has no power to hear an application for habeas corpus. It is essential to consider the circumstances of the case. In this case, the applicant is serving sentence. If on an appeal it is held that the sessions court had no competent jurisdiction, he would have lost his liberty unlawfully while waiting for his appeal or revision to be heard, and the court cannot be party to it. Thus in a matter involving not merely a question of exceeding its jurisdiction but the competency of the court itself, and an applicant is being detained or imprisoned by an order of that court, habeas corpus must be available as a remedy under art 5(2).

The appellant submits that the learned judge was right in the view he took of the matter. The respondents argue that he was wrong. It is clear from the arguments of counsel that the axis of the dispute turns upon the meaning that is to be given to the expressions 'unlawfully detained' and 'detention' appearing in art 5(2) of the supreme law.

If, as argued by the appellant and found by the learned judge, these expressions are of the widest amplitude, it would follow that any detention, including one that is made in execution of a sentence passed by a court of law, may be questioned in habeas corpus proceedings without having resort to either the right of appeal or the power of revision conferred by the CPC as well as the Courts of Judicature Act 1964. But, if these expressions are to be read, as the respondents contend that they should be read, to refer only to detention other than one pursuant to the execution of sentence passed by a court, then the judge must be held to have erred in his conclusion. Before expressing an opinion on this part of the appeal, we propose to examine the approach taken by the courts of four other Commonwealth jurisdictions, England, India, Australia and Canada, for the purpose of obtaining some guidance from them.

We begin with the English cases.

In *R v Governor of Pentonville Prison & Anor, Ex parte Azam* [1973] 2 WLR 949, it was a case of detention under the United Kingdom Immigration Act 1971 which, among other things, provided for an appeal to an adjudicator. Lord Denning MR there said (at p 960):

> These provisions as to appeal give rise to a question of the first importance. Do they take away a person's right to come to the High Court and seek a writ of habeas corpus? I do not think so. If Parliament is to suspend habeas corpus, it must do so expressly or by clear implication.

It must, however, be borne in mind that *Azam* was not a case involving a criminal conviction. The appeal in that case was part of the statutory scheme relating to the detention of illegal immigrants. So, the observation of the Master of the Rolls that an appeal did not operate as a bar to habeas corpus, was made in the context of administrative law and not the criminal law.

In *R v Secretary of State for the Home Department, Ex parte Mughal* [1973] 1 WLR 1133, Lord Widgery LCJ referred to the decision in *Ex parte Azam* and said (at p 1136): A

> To begin with, I would not regard this as a true habeas corpus case. I say that because where a man is free in this country and going about his ordinary business, and is arrested by the police and charged with being an illegal B immigrant, his proper remedy is habeas corpus, and the burden in such matters may very well not lie on him. I say deliberately 'may not lie on him' because we have other cases of the kind to which I have just referred coming before this court shortly where the matter will have to be specially considered, and it is also to be remembered that in *R* v *Governor of Pentonville Prison, Ex parte Azam* [1973] 2 WLR 949 at pp 960–961, Lord Denning MR in the C Court of Appeal emphasized that in a true habeas corpus case, it was not really open to the court to refuse the writ merely because some other procedure for disposing of the issue might be more convenient.

Several years earlier, in *R v The Commanding Officer of Morn Hill Camp, Winchester, Ex parte Ferguson* [1917] 1 KB 176 where a magistrate handed a man to the military authorities for failing to enlist, Lord Reading CJ D observed (at p 179):

> In this case the magistrate has held that the prosecutor was 'for the time being ordinarily resident in Great Britain' within the meaning of s 1 of the Military Service Act 1916 (Session 2). The prosecutor has sought to question that decision by means of a writ of habeas corpus. If the jurisdiction exercised by E the magistrate is a jurisdiction which has been conferred upon him by the statute, then notwithstanding that he may have come to a wrong decision on the facts or upon the law, it is clear that his decision cannot be questioned by this procedure. In the present case, there is no doubt as to the jurisdiction of the magistrate. It is not suggested that he was not the proper tribunal to deal with the case. It is suggested that he came to a wrong conclusion. But if an F erroneous decision of a magistrate entitled a party detained by the magistrate's order to come to this court for a writ of habeas corpus, that writ would furnish a ready means of appealing to this court from every decision of a magistrate ordering the detention of an offender. *If there were no means of questioning a magistrate's order, there might be some ground for invoking the assistance of this court in the way chosen in this case, but there is a well-known procedure by way of special case whereby the decisions of magistrates can be inquired into.* In my G opinion, we have no jurisdiction to interfere in such a case as the present. (Emphasis added.)

We pause to mention, by way of caution, that the remarks of the learned Lord Chief Justice were made at a time when administrative law was in its early infancy. Also, the learning contained in the landmark decision of the H House of Lords in *Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 2 AC 147 and the cases that have since followed and explained it was not as yet available when the Lord Chief Justice expressed himself. *Ex parte Ferguson*, however, appears to continue as good authority for the proposition that habeas corpus is not available to challenge orders made by I a court of competent jurisdiction when there exists a right of appeal to a superior court against such orders.

Finally, in *Linnett v Coles* [1987] 1 QB 555, Lawton LJ (with whom Dillon and Woolf LJJ agreed), when considering the appeal provisions in s 13(1) of the Administration of Justice Act 1960 made the following observation (at p 561):

> In order to decide whether s 13(3) should be construed narrowly, it has been necessary to consider the ambit of the writ of habeas corpus. It is a writ of right, not of course, because the party applying for it has to show some reasonable ground for being awarded it: see *Blackstone's Commentaries*, 17th Ed (1830), vol 3, p 141. A writ of habeas corpus is probably the most cherished sacred cow in the British constitution; but the law has never allowed it to graze in all legal pastures. The proceedings of criminal courts of record seem to have forbidden it. Of the many cases drawn to our attention when error was revealed on the face of the record, only one, *Ex parte Hopkins* (1891) 61 LJQB 240, related to a return showing detention by the order of such a court. That was the curious case of Daisy Hopkins, who had been convicted in the Vice-Chancellor's court of Cambridge University of 'walking with a member of the university' and committed to the Spinning House for 14 days. Before the Indictments Act 1915 the record of a criminal conviction on indictment was a fairly complicated document. Between about 1662, when the Court of King's Bench began to exercise its supervisory jurisdiction over inferior courts, and 1915 cases must have occurred when such records were drawn up incorrectly; and since 1915 cases have occurred within my own judicial experience when the endorsement of the conviction or sentence on the indictment has been wrong. Nevertheless, writs of habeas corpus are not recorded as having issued in such cases. Before 1907, when they occurred, recourse had to be made to the writ of error; and since that year to appeals under the Criminal Appeals Acts 1907 to 1968. In *Re Featherstone* (1953) 37 Cr App R 146, Lord Goddard CJ, that master of Crown practice, said at p 147:
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> > 'The court does not grant, and cannot grant, writs of habeas corpus to persons who are in execution, that is to say, persons who are serving sentences passed by *courts of competent jurisdiction*. Probably the only case in which the court would grant habeas corpus would be if it were satisfied that the prisoner was being held after the term of the sentence passed on him had expired.'
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> In a practice note, *Re Wring* [1960] 1 WLR 138, Lord Parker CJ cited with approval what Lord Goddard CJ had said. The practice note, of course, did not say that applications for writs of habeas corpus could not be made, it discouraged them as being unlikely to succeed. (Emphasis added.)

So much for the English cases.

As for cases decided in India, we propose to examine only two of them. Both are decisions of the Supreme Court. The first is *Janardhan Reddy v The State of Hyderabad* AIR 1951 SC 217, where Fazl Ali J, after examining a number of English cases, said:

> The trend of decisions thus seems to be in favour of the view that if it should appear on the face of the return that a person is in detention in execution of a sentence on indictment on a criminal charge, that would be a sufficient answer to an application for a writ of habeas corpus. Assuming, however, that it is open even in such cases to investigate the question of jurisdiction, as was held in *Re Authers* (1889) 22 QBD 845 (58 LJMC 62), it appears to us that the

> learned judges who decided that case went too far in holding that notwithstanding the fact that the conviction and sentence had been upheld on appeal by a court of competent jurisdiction the mere fact that the trial court had acted without jurisdiction to justify interference treating the appellate order also as a nullity.
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> It is well settled that if a court acts without jurisdiction, its decision can be challenged in the same way as it would have been challenged if it had acted with jurisdiction, ie an appeal would lie to the court to which it would lie if its order was with jurisdiction.

The second Indian case is *B Ramachandra Rao v The State of Orissa* AIR 1971 SC 2197, where it was held that a writ of habeas corpus will not be granted where a person is committed to custody in a prison by a competent court by an order which prima facie does not appear to be without jurisdiction or wholly illegal. (See per Dua J, at p 2199 of the report.)

As presently advised, we find the position in Australia to be that reflected in the decision of the Full Court in *Re Keogh* (1889) 15 VLR 395 where it was held that where a right of appeal is conferred by statute, and 'the justices are in error by neglecting to procure sufficient proof against the person charged, the whole matter may be argued over again, and the person aggrieved may obtain a remedy for an unjust conviction; but he cannot do so by having recourse to procedure by habeas corpus or certiorari.' (Per Higinbotham CJ at p 400 of the report.)

In Canada, it would appear that despite the entrenchment of fundamental rights in the Canadian Charter of Rights and Freedoms, a doubt persists as to whether the remedy of habeas corpus is available to an applicant who has an alternative remedy under statute. (See *Reference Re Procedures and the Mental Health Act* (1984) 5 DLR (4th) 577, a decision of the Full Court of the Supreme Court of Prince Edward Island.) In that case, it was also held that a judge hearing a habeas corpus application may not, in the absence of a patent irregularity on the face of it, look beyond the record. To this extent, the position in Canada seems to accord with the views expressed by Dua J in *B Ramachandra Rao v The State of Orissa*.

That completes our rather brief review of the authorities from other jurisdictions. While we certainly benefit from their jurisprudence, it must ultimately fall to us to make a determination based upon the wording of our Federal Constitution in accordance with the settled guidelines of constitutional interpretation.

In the present case, we have a choice. It is open to us to accept either the construction that found favour with the learned judge or that canvassed by the respondents. An interpretation of art 5(2) wide enough to include cases of criminal conviction would stultify existing law relating to criminal procedure. It would in effect negate those provisions of the CPC and the Courts of Judicature Act 1964 which make specific provision for appeals. It would throw criminal procedure into a hopeless disarray of cases where either remedy is resorted to. One would then have to begin establishing some recognizable parameters of the court's jurisdiction in habeas corpus as

A opposed to appellate proceedings. It would lead to uncertainty. It is therefore a construction that we reject. We think that we should, instead, adopt a construction that harmonizes the article with existing law. See *Kesavananda Bharati v The State of Kerala* AIR 1973 SC 1461. By so doing, we permit the smooth operation of existing law.

B Therefore, after anxious consideration, we have come to the conclusion that the respondents' argument on the availability of habeas corpus to a case such as the present is correct. We are therefore of the view that the learned judge was wrong in the construction he placed upon art 5(2) of the Federal Constitution.

In our judgment, the expressions 'unlawfully detained' and 'detention' C employed by the article do not apply to the case of a person held in a prison in execution of a sentence passed by a court of competent jurisdiction. Habeas corpus does not lie as a remedy in such a case. The only remedy is that of appeal under s 307 or s 358 of the CPC or an application for the court to exercise its powers of revision under s 323 of the CPC or the much wider s 35 of the Courts of Judicature Act 1964. This is so even where an D accused who has pleaded guilty intends nevertheless to challenge his conviction. For as Abdoolcader J (later SCJ) said in *PP v Manokaran* [1979] 1 MLJ 262 at p 263:

> I would merely add that in my view, notwithstanding the provisions of s 305 of the Criminal Procedure Code, an appeal against a conviction on a plea of E guilty will still lie if the charge discloses no offence in law, in which event the conviction itself would be illegal and a nullity.

The only instance in such circumstances where habeas corpus may exceptionally lie would be a case where the court passing sentence had no jurisdiction to do so. However, absence of jurisdiction must be patent upon F the face of the record, for example, a magistrate's or a sessions court passing sentence of death. However, habeas corpus is not available if lack of jurisdiction falls to be established by having recourse to matters dehors the record. Appeal or revision is the only remedy in such cases.

The question then arises whether the present case falls within the exception to the inapplicability of habeas corpus. It would, if the sessions G court at Kuala Lumpur that passed sentence upon the appellant plainly lacked jurisdiction. Confining ourselves to the record, we find that the charge against the appellant was one under s 377D of the Penal Code (FMS Cap 45) and is therefore one which the sessions court plainly had jurisdiction to try. The sentence of six months which that court passed upon H the appellant is one which it plainly had jurisdiction to pass. Ex facie, therefore, the sessions court did not lack jurisdiction to make the orders it did. The appellant's case does not therefore come within the exception. Habeas corpus is accordingly not available to him as a matter of law.

We may add that an argument that an appeal by the instant appellant against conviction or sentence or both would be nugatory on the ground I that he will complete his sentence before his appeal is heard is irrelevant. It is irrelevant because the appellant has other options open to him, eg a request for an early hearing of the appeal or a petition for criminal revision

or an application for bail pending appeal each of which have the effect of meeting the justice of the case. A

For these reasons, we are of the considered opinion that the learned judge ought to have upheld the respondents' preliminary objection and dismissed the appellant's application.

Before we move further, we must make mention that we have gained much assistance from the article 'Habeas Corpus in Malaysia and Singapore' written by Low Hop Bing J and published in [1977] 2 MLJ lv when deliberating upon this part of the appeal. B

With that, we now turn to consider the second issue upon the assumption that we are wrong in our conclusions upon the first issue. C

Second issue: should the appellant have habeas corpus?

Assuming habeas corpus does lie, then, was the judge right in refusing the appellant relief? The answer to that question would depend upon whether the sessions court lacked jurisdiction over the person of the appellant. Since the effect of art 121 cll (1) and (1A) lie at the heart of the appellant's case on this issue, it is convenient to reproduce those provisions here: D

> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and E
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
>
> and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law. F
>
> (1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

The effect of these provisions upon religious and matrimonial disputes has already been considered by our former Supreme Court. See *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793; *Dalip Kaur v Pegawai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1. The judgments delivered in those cases, though couched in general terms, were not concerned, as we are here, with a charge under the Penal Code (FMS Cap 45). Consequently, while the decisions in those cases are binding and the views there expressed are entitled to great weight, they are of little assistance upon the question that has been brought into sharp focus in the present appeal. G H

Turning now to the appellant's arguments in respect of the second issue, we find that these may be fairly summarized in the following manner. I

The appellant was charged before the sessions court with gross indecency. That is an activity proscribed by s 377D of the Penal Code

(FMS Cap 45). The facts given by the prosecution in support of the charge reveal an allegation that the appellant had allowed himself to be sodomized by another male Muslim. However, these very facts actually disclose an offence under the Syariah Criminal Offences (Federal Territories) Act 1997 ('the Act'). The Act, by virtue of s 1(2)(b) thereof, applies to persons professing the religion of Islam. The Act creates the offence of 'liwat' which under s 2 means 'sexual relations between male persons'. The appellant is a person professing the religion of Islam. The gist of the allegation against him is one of 'liwat'. Indeed, the prosecution when presenting the facts of the case to the sessions court had used the expression 'meliwat' to describe what had taken place. It follows that the syariah court to the exclusion of all other courts has jurisdiction over the appellant and the offence which the appellant is alleged to have committed. The sessions court, therefore, had no jurisdiction because of art 121 (1) and (1A) of the Federal Constitution.

So much for the appellant's argument.

In our view, this part of the appeal turns upon the true interpretation that art 121(1A) is to receive. Does cl (1A) to art 121 mean that the ordinary courts are to have no jurisdiction over all matters, including offences under the Penal Code (FMS Cap 45) committed by persons professing the religion of Islam, which are also within the jurisdiction of the syariah court? Or does it mean that the former is not to have jurisdiction over only those matters which are within the exclusive jurisdiction of the latter? However, before we resolve the controversy that has thus arisen, we think it useful to examine the legislative history of art 121(1A) which was introduced by amendment on 10 June 1988 by Act A704/88.

Prior to the introduction of art 121(1A), the ordinary courts had the power to review, and quite regularly reviewed, the decisions of syariah courts by certiorari. That this caused some concern among those entrusted with the task of administering Muslim law is reflected in the speech delivered in the Dewan Rakyat when introducing the Bill that eventually became Act A704/88. We say at once that we are, in the circumstances of the present case, entitled to refer to the proceedings during the debate of the Bill in the Dewan Rakyat. No question of parliamentary privilege arises here. That we are entitled to make such reference is now settled by the decision of the Federal Court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 which followed the majority speeches of the House in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42. Having examined the Hansard of the Dewan Rakyat, we find support for the conclusion that the limited purpose of Act A704/88 was to prevent the High Court from exercising its powers of judicial review over decisions of a syariah court.

In our view, art 121(1A) should receive that meaning which advances the purpose for which it was introduced into the Federal Constitution. If it becomes necessary to make an implication, as we think the present case does, then we shall make it. We are satisfied that such an approach would harmonize the article in question with the rest of the Constitution. It would, as contended by the respondents, certainly remove the spectre of a conflict between that article and other provisions of the Constitution, in particular

the Ninth Schedule, with regard to any question of legislative competence upon the subject of criminal law. Equally, it will ensure that well-established provisions of the Penal Code (FMS Cap 45) are not rendered nugatory. In deciding upon this course, we are really following a well-trodden path of constitutional interpretation.

Accordingly, in the light of the authorities we have referred to earlier in this judgment, we have come to the conclusion that the expression 'jurisdiction of the syariah courts' refers to 'the *exclusive* jurisdiction' of those courts. In other words, if a person professing the religion of Islam does a proscribed act which is an offence both under the Penal Code (FMS Cap 45) and the Act, then the courts referred to in art 121(1) will have jurisdiction to try such an offence. It is only in respect of offences under the Act that a syariah court may have exclusive jurisdiction. For example, the offence of adultery which is prescribed as an offence under the Act has no equivalent in the Penal Code (FMS Cap 45) or other federal criminal statutes. So if a person professing the religion of Islam commits adultery, then he or she may be tried only in a syariah court.

We therefore find ourselves unable to agree with the submission of En Karpal Singh of counsel for the appellant that the interpretation we have placed upon art 121(1A) has the effect of negating the provisions of the Act. For, it is clear that 'where the law provides, either in the same or different enactments, for different penalties for the same offence that both or all of the provisions as to punishments are intended to stand side by side and that it is left to the proper authorities to decide under which of the different provisions the offender shall be prosecuted and punished.' (Per Spenser Wilkinson J in *PP v Viran* [1947] MLJ 62 at p 64.) The appellant's concern, voiced through his counsel, that he may be open to prosecution twice over, once under the Penal Code (FMS Cap 45) and later under the Act, is really without basis by reason of the express provisions of art 7(2) of the Federal Constitution. That article reads:

> A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.

We also note that the offence defined by s 377D of the Penal Code (FMS Cap 45) is much wider than the offence of 'liwat' under the Act. This reinforces the view we take in regard to the interpretation that art 121(1A) should receive. It is no doubt true that the prosecution used the term 'meliwat' to describe the actus reus committed by the appellant in the statement of facts in support of the charge. But the use of that expression did not take the case out of the jurisdiction of the sessions court. For it must be borne in mind that the sessions court was not dealing with an offence of 'liwat' under the Act. It was merely dealing with an offence of gross indecency under s 377D of the Penal Code (FMS Cap 45).

In his judgment, the learned judge advanced another reason for holding that the sessions court had jurisdiction over the appellant. He said that

jurisdiction was conferred upon the sessions court by reason of art 145(3) read with s 376 of the CPC. The effect of these two provisions have been considered in a number of cases. See *Long bin Samat & Ors v PP* [1974] 2 MLJ 152; *PP v Datuk Harun bin Hj Idris & Ors* [1976] 2 MLJ 116 and *Repco Holdings Bhd v PP* [1997] 3 MLJ 681. Their combined effect is to vest in the Attorney General a discretion with regard to the institution, conduct and discontinuance of criminal proceedings before the ordinary courts. It is a discretion that is not subject to judicial review. Were it otherwise, it would be the court and not the Attorney General which would be indirectly exercising the powers conferred by art 145(3). That was certainly not the intention of the framers of the Constitution.

However, no matter how wide art 145(3) may be, it has not the effect of conferring jurisdiction upon a court which has none. In other words, the Attorney General may, at his discretion, institute criminal proceedings before a court of competent jurisdiction. But the fact that he has instituted criminal proceedings before a particular court would not confer jurisdiction upon that tribunal if it lacked jurisdiction for some other reason. If, for example, the Attorney General were to institute proceedings under s 39B of the Dangerous Drugs Act 1952 before a magistrate's court, that would not confer jurisdiction upon the magistrate to try the case to conclusion. This is because a magistrate's court is not seised of jurisdiction under the Subordinate Courts Act 1948 to try such a case. Absent jurisdiction, the institution by the Attorney General of criminal proceedings adds nothing.

We are therefore unable to agree with the learned judge's conclusion that art 145(3) read with s 376 had the effect of conferring jurisdiction upon the sessions court in the present instance.

Conclusion

For the reasons already given, the appeal is dismissed. The orders made by the learned judge are affirmed.

We express our appreciation to En Karpal Singh and Dato' Ahmad Maarop for their careful and well-researched submissions. Their effort has made our task light.

Appeal dismissed.

Reported by David Lai